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NO. 88-2002

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

EMMA F. GILMERE, individually , and as Administratrix of the Estate of Thomas Patillo, and for the benefit of his next of kin,

Petitioner

v.

CITY OF ATLANTA, GEORGIA, R.C. SAMPSON and C.C. CRAIG, individually and in their official capacity,

Respondents

REPLY BRIEF OF PETITIONER ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Petitioner, Emma F. Gilmere, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered March 6, 1989, reported at 864 F.2d 734 (11th Cir. 1989).

REASONS FOR GRANTING THE WRIT

1a. This Court's most recent rulings mandate that state statutory damages be awarded in deprivation of life claims brought under 42 U.S.C. §1983.

In its most recent ruling this Court again unanimously held, as it has consistently done, that "gaps in civil rights acts should be filled by state law, as long as that law is not inconsistent with federal law." Hardin v. Straub, ____ U.S. ____ (1989) No. 87-7023, 45 Cr.L. 3069, 3070. Citing Wilson v. Garcia, 471 U.S. 261, 271 (1985), the Court held this borrowing of state statutes "is based on a congressional decision to defer to 'the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action.'" Hardin, supra 45 Cr.L. at 3070. This

Court further held in Hardin, that the lower courts should not "unravel" applicable state laws "unless their full application would defeat the goals of the federal statute at issue." Id.

The Hardin[1] Court goes on to say that a decision to ignore the state statutory scheme can only be done when the state statutory scheme frustrates §1983's goals of compensation and deterrence. Certainly, here, the state

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[1] In a footnote the Hardin Court noted that just last term in Felder v. Casey, 487 U.S.____,____ (1988) that it reiterated that "'the central objective of the Reconstruction-Era civil rights statutes...is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief.' Burnett v. Grattan, 468 U.S. 42,55 (1984). Thus, §1983 provides 'a uniquely federal remedy against incursions...upon rights secured by the Constitution and laws of the Nation,' Mitchum v. Foster, 407 U.S. 225, 239 (1972), and is to be accorded 'a sweep as broad as its language." United States v. Price, 383 U.S. 787, 801 (1966)."

statutory scheme on damages in wrongful death cases does not frustrate the compensation and deterrence factors in §1983 awards. In fact it is the holding of the courts below, in choosing to ignore the state statutory scheme, that frustrates §1983.

Thus, the state damage remedy would be the appropriate reference point for in determining damages for the deprivation of life in a §1983 claim. Carey v. Piphus, 435 U.S. 247 (1978). In fact this Court has indicated that damages for deaths resulting from a violation of §1983 are the same as damages under a state wrongful death statute "where the 1983 damages claim is based upon the same injuries." Jones v. Hildebrandt, 191 Colo. 1, 550 P.2d 339 (1976), cert. dismissed as improvidently granted, 432 U.S. 183, 189 (1977).

Both the district court and the most recent panel decision of the Eleventh Circuit went on at great length to give their interpretation of a proper measure of damages in §1983 cases. However, these courts completely ignored the body of Georgia law that has carefully considered all applicable factors in fashioning s state damage remedy in wrongful death cases.

Primarily this Court should consider that this issue is present in this case, not by Plaintiff's inartful pleading, but by the district court's misreading of the law. In its original order the district court said it could not award wrongful death damages because under state law the next of kin did not have such a cause of action. (Appendix I 59a) It is only when Plaintiff filed a motion to alter or amend the original judgment to point out

the district court's complete misreading of the Georgia law that the district court held that a wrongful death cause of action had never been pled or tried. (Appendix II 90a)

As the distict court belatedly admitted, Georgia law clearly provides that the next of kin have a cause of action for wrongful death. O.C.G.A. §51-4-1,5. But the "dependency" theory advanced by the district court for denying damages for the full value of the life of the decedent has been expressly rejected by the Georgia courts and the legislature in enacting O.C.G.A. §51-4-1,5. See Eldridge, Ga. Wrongful Death, §10-42.

In refusing to award state statutory damages the lower courts in this case looked only to the compensation principle totally ignoring that Georgia law has

already held that "the half forgotten and rarely emphasized purpose of the wrongful death act was to deter homicide, whether criminal or negligent, by imposing a heavy civil penalty upon the tortfeasor." Eldridge, supra at §10-43.

> The statute is, however, one that is intended to inflict a punishment upon wrongdoers who bring about the death of a human being by negligence. **** The General Assembly has a right to impose upon a wrongdoer any penalty suitable, as a punishment for the wrong he has committed, unless such punishment is prohibited by some constitutional provision."

Savannah Electric Company v. Bell, 124 Ga. 663, 53 S.E. 193 (1905). Similarly, the full value of life concept is rooted in the common law and provides adequate compensation while creating a penalty but not allowing punitive damages as allowed in other torts. Engle v. Finch, 165 Ga. 131, 134, 139 S.E. 868 (1927). The

theory behind assessing damages for the full value of a life was set out in Southern Railway v. Decker, 5 Ga. App. 21, 62 S.E. 678 (1908).

The basis for determining damages under the Georgia statutory scheme is the full value of the life, that is the yearly income or projected economic worth of the deceased times the life expectancy. Miller v. Tuten, 137 Ga. App. 188, 223 S.E.2d 237 (1976). But the "full value of the life" is something more than the present cash value of the earnings of a lifetime of services of a lifetime; it also encompasses certain intangibles which may have no ascertainable value except to the deceased and to the plaintiff" Smith v. McBride, 119 Ga. App. 94(1), 166 S.E.2d 407 (1969).

Thus, the policies underlying the

state statutory scheme authorizing compensation are not in conflict with the policies underlying §1983 compensation, and so, should have been followed by the lower courts.

1b. Respondents totally misrepresent the record, just as the lower courts have, in claiming that a wrongful death cause of action was not pled and tried.

Respondent's Brief in Opposition summarizes its argument in this respect by saying: "This issue of pleading and practice was the subject of careful analysis by the trial court and by the Court of Appeals." (Brief of Respondent, p.6) However, both the district court and the Eleventh Circuit panel completely ignored the facts of the case and created their own to support their erroneous conclusions.

First, it must be noted that the

pleading of the wrongful death claim would never have been an issue, except that the district court, after ruling that Plaintiff had prevailed on the wrongful death claim, ruled that it could not award state statutory damages because state law prohibited the next of kin from bringing such an action. (Appendix I, 59a) Plaintiff then filed a motion to alter or amend the judgment pointing out that Georgia law did allow the next of kin to recover for wrongful death. See O.C.G.A. §51-4-1,5. It was after the filing of this motion that the district court admitted its mistake but then found a new way to deprive Plaintiff of wrongful death damages by creating its "finding" that Plaintiff did not plead a wrongful death cause of action. (Appendix II, 90a)

Second, the panel says that: "There

is no indication in the complaint that the appellant intended to raise a pendent claim for wrongful death." Gilmere, supra 864 F.2d at 737. Plaintiff alleged the wrongful death claim in Count I of her complaint, along with the constitutional claims, the same as other cases in this district have pled the wrongful death claim. See e.g., McQurter v. City of Atlanta, 572 F. Supp. 1401 (N.D. Ga. 1983), aff'd. 724 F.2d 881 (11th Cir. 1984). Assault, battery, false imprisonment, etc., are lesser claims pled in the event that Plaintiff does not prevail on the main claim - wrongful death. Paragraph 23 of the complaint stated: "The Plaintiff has suffered the loss of her brother and is entitled to recover damages for the wrongful death." (R12) Paragraph 24 of the complaint states: "(T)he defendant's actions are

the proximate cause of the death of THOMAS E. PATILLO and the Plaintiff is entitled to recover the full value of his life, funeral and medical expenses and damages." (R13)

Third, the panel found that "counsel for appellees" specifically objected to the wrongful death claim at trial. Well, the record shows that neither the City of Atlanta, Defendant Sampson, the City officials sued nor their attorneys made any such objection. (T1315, 1380) The objection that was made was made by counsel for Craig, the only Defendant not represented by the City of Atlanta attorneys. (As pointed out in the Petitioner's certiorari petition Defendant Craig has never filed any appeal in this case.) The other Defendants did not join in this objection at trial. And in fact, the attorney for

Craig, who did make the objection at trial, later clarified that his objection was that there was no prayer for wrongful death damages and that Ms. Gilmere was not the property party Plaintiff (T1373), and then later admitted that a wrongful death cause of action was pled in the case. (T1368) More importantly neither counsel mentioned this objection in their directed verdict motions or in their response to Plaintiff's proposed findings of fact, or in any other pleading. (T1355-1372)

Fourth, and more importantly, this objection as to whether the case stated a wrongful death claim was overruled by the trial Court, when the court finally said to the repeated objection on another issue that it intended to hold the parties to the causes of action set out in the Proposed Findings of fact and

Conclusion of Law which the Court required to be filed before trial in lieu of a pre-trial order. (T1350) Plaintiff's proposed findings mentioned the wrongful death claim at least three times, including the statement that :" The pendent state claim for wrongful death falls on the next of kin." (R152) Again in Plaintiff's motion for directed verdict, Plaintiff stated: "Plaintiff has proved by a preponderance of the evidence the requisites of the pendent state claims of wrongful death *** and the constitutional violation of wrongful death." (R133)

Fifth, the panel's indication in a footnote that their decision might be different "had the survivors sought recovery for their injuries" shows a complete lack of knowledge of Georgia law as to practice and procedure. Gilmere,

supra 864 F.2d at 739. However, Georgia law specifically excludes a suit by the survivors for their injuries. Bell v. Sigal, 129 Ga. App. 249, 199 S.E.2d 355 (1973) See Eldridge, supra at §10-47: "The full value of life does not include grief, mental pain and suffering by the beneficiary; it does not include loss of society, company, companionship, or consortium of the deceased; it does not include for the loss of the deceased providing for the wants and needs of the beneficiaries." In Georgia only the father of a deceased minor child has a separate cause of action for the loss of services of a decedent. Daughtry v. Stubbs, 119 Ga. App. 429, 167 S.E.2d 233 (1969).

2. The most recent rulings by this Court mandate that the municipal entity be held responsible for the damages, costs and attorney's fees

awarded against municipal officers acting in their official capacities.

In light of Will v. Michigan Department of State Police, ____U.S.____ (1989), No. 87-1207, 45 Cr.L. 3087, this Court should grant certiorari to make explicit what this court said in Kentucky v. Graham, 473 U.S. 159, 167 (1985) that: "Only in an official capacity action is a Plaintiff who prevails entitled to look for relief, both on the merits and for fees, to the government entity." (emphasis supplied.)

Here, the prevailing plaintiff is effectively left without a remedy because the district court will not order fees, costs or the damage award to be paid by the municipality. The Defendants-respondents have refused to pay the judgment and have successfully shielded the wages of the Defendants-employees

Sampson and Craig from garnishment. See City of Atlanta v. Gilmere, 252 Ga. 406 (1984).

The acts of Defendants Sampson and Craig were carried out in their official capacities. The district court specifically found that "(t)here can be no doubt that Craig and Sampson were acting in their official capacities as Atlanta police officers." (Appendix I 30a) The in banc Eleventh Circuit found that the officers were acting in their official capacities and that the killing resulted from the officer's "improper use of his official power." Gilmere v. City of Atlanta, 774 F.2d 1495, 1501 (11th Cir. 1985) (in banc).

Therefore Plaintiff contends that the issue is controlled by this Court's decision in Brandon v. Holt, 469 U.S. 464, 468 (1985) which held that: "In at

least three recent cases arising under §1983, we have plainly implied that a judgment against a public servant 'in his official capacity' imposes liability on the entity he represents, provided, of course, the public entity receives notice and an opportunity to respond. We now make that point explicit." The Court's decision therein cites Hutto v. Finney, 437 U.S. 678 (1978) where a judgment against an official was ordered to be paid out of state funds. Accord Odum v. Clark, 748 F.2d 1538, 1542 (11th Cir. 1984).

Instead of ordering the City to pay the lower courts here have in fact said the City should not pay and cannot be made to pay. Indeed, the Eleventh Circuit panel simply dismissed Petitioner's claim to make the City pay as "frivolous". Gilmere, supra, 864 F.2d

at 742. In fact that Eleventh Circuit panel mischaracterized Petitioner's attempt to force the City to pay as a request to impose liability on the City.

In light of the lower courts' total disregard for the rulings of this court, and in light of Will v. Michigan Department of State Police, supra, this Court should grant certiorari and make it clear that in official capacity actions that municipal entities must be held accountable.

3. Petitioner's brief is in compliance with the rules of this Court.

Apparently the Respondents are totally unaware of Rule 33.3, Rules of the Supreme Court, that says, in relevant part, that where documents are produced by photostatic or similar process a Petition for Certiorari will be limited

to 65 pages and a reply brief to 20 pages.

CONCLUSION

Petitioner calls upon this Court to correct a great injustice by the courts below that have ruled that a black man's life, who was murdered by the police, is worth only $20,000. If not addressed by the Court, the ruling below will leave civil rights litigants with a tenuous remedy in civil rights cases, allowing each court to fashion a remedy on a case by case basis, based on the whim and caprice of the fact-finder. Thomas Patillo was unlawfully killed on January 1, 1980. Justice demands that not only that there be adequate compensation, but that such compensation be actually paid in order to deter future wrongdoing.

_____

J.M. Raffauf

CERTIFICATE OF SERVICE

I hereby certify that I have served this Reply Brief upon the Respondents-Defendants by mailing three copies on July , 1989 to:

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